APPEAL NO. 152531
FILED MARCH 7, 2016

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on June 25, 2015, with the record closing on November 24, 2015, in El Paso, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury extends to MRI findings of the lumbar spine taken on September 25, 2013 (a small midline annulus tear at L4-5) and the MRI findings of the lumbar spine taken on September 16, 2014 (L4 laminectomy defect consistent with mild epidural fibrosis associated mild focal retraction of the thecal sac and nerve roots, a small pseudomeningocele at L4, mild degenerative changes at L5-S1 associated shallow right foraminal focal disc protrusion without significant nerve root impingement); (2) the respondent (claimant) had disability from November 13, 2014, through the date of the CCH; (3) the claimant reached maximum medical improvement (MMI) on June 10, 2015; and (4) the claimant's impairment rating (IR) is 10%.

The appellant (carrier) appealed all of the hearing officer's determinations, contending that the hearing officer erred in making her determinations. The carrier also argued that the hearing officer abused her discretion in denying the carrier's request for a continuance, and also abused her discretion when she admitted Claimant's Exhibit 4 into evidence over the carrier's objection. The claimant responded urging affirmance of the hearing officer's determinations, and also contended that the hearing officer did not abuse her discretion in denying the carrier's request for continuance or in admitting Claimant's Exhibit 4.

We note that the decision and order contains an incorrect zip code for the carrier's registered agent for service of process.

DECISION

Reformed in part, affirmed in part, reversed and rendered in part, and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on (date if injury). The parties also stipulated at the CCH that the compensable injury was at least in the form of an umbilical hernia with a bowel obstruction; however, the stipulation listed in Finding of Fact No. 1.D. does not contain that portion of the stipulation. We reform Finding of Fact No. 1.D. as follows, to conform to the actual stipulation made by the parties at the CCH:

On (date if injury), the claimant sustained a compensable injury at least in the form of an umbilical hernia with a bowel obstruction.

The claimant testified he was injured while lifting a 50-pound box of cement stone material and placing the box into a cabinet. The parties stipulated that the claimant's date of statutory MMI is June 10, 2015.

ABUSE OF DISCRETION

The carrier argued that the hearing officer abused her discretion in denying the carrier's request for a continuance to allow the completion of a peer review report, and in admitting Claimant's Exhibit 4 into evidence, which is a report dated June 9, 2015, from the claimant's surgeon. The hearing officer denied the carrier's request for continuance and admitted Claimant's Exhibit 4, having found good cause for the untimely exchange of that exhibit. The hearing officer held the record open to allow the carrier to admit the peer review report into evidence. The peer review report, dated June 30, 2015, was admitted into evidence, and specifically addresses the June 9, 2015, surgeon's report admitted as Claimant's Exhibit 4.

To obtain a reversal of a judgment based on the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. *Hernandez v. Hernandez*, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Appeals Panel Decision (APD) 043000, decided January 12, 2005; APD 121647, decided October 24, 2012; *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex. 1986). Rulings on continuances are also reviewed under an abuse-of-discretion standard and the Appeals Panel will not disturb the hearing officer's ruling on a continuance absent an abuse of discretion. We hold that under the circumstances of this case the hearing officer did not abuse her discretion in denying the carrier's request for continuance, nor did she abuse her discretion in admitting Claimant's Exhibit 4.

EXTENT OF INJURY

That portion of the hearing officer's determination that the compensable injury extends to the MRI findings of the lumbar spine taken on September 16, 2014 (L4 laminectomy defect consistent with mild epidural fibrosis associated mild focal retraction of the thecal sac and nerve roots, a small pseudomeningocele at L4, mild degenerative changes at L5-S1 associated shallow right foraminal focal disc protrusion without significant nerve root impingement) is supported by sufficient evidence and is affirmed.

The Appeals Panel has previously held that proof of causation must be established to a reasonable medical probability by expert evidence where the subject is so complex that a fact finder lacks the ability from common knowledge to find a causal connection. *See* APD 022301, decided October 23, 2002. *See also Guevara v. Ferrer*, 247 S.W.3d 662 (Tex. 2007). To be probative, expert testimony must be based on reasonable medical probability. *City of Laredo v. Garza*, 293 S.W.3d 625 (Tex. App.-San Antonio 2009, no pet.) citing *Insurance Company of North America v. Meyers*, 411 S.W.2d 710, 713 (Tex. 1966).

The hearing officer also determined that the compensable injury extends to the MRI findings of the lumbar spine taken on September 25, 2013 (a small midline annulus tear at L4-5). The hearing officer stated the following in her Discussion:

> . . . the neurosurgeon persuasively explained that the mechanism of injury was consistent with the MRI findings of the lumbar spine taken on September 25, 2013, which resulted in surgery to the lumbar spine in January of 2014.

However, (Dr. S), the claimant's surgeon, does not in any of his reports in evidence reference or discuss a small midline annulus tear at L4-5 or the September 25, 2013, MRI. Instead, Dr. S discusses a herniated disc at L4-5, and opined that the producing cause of that herniation was the lifting, holding, and squatting with a 50-pound load at work.

There were no medical reports in evidence, including those from Dr. S, that explain how the compensable injury caused a small midline annulus tear at L4-5. Therefore, we reverse that portion of the hearing officer's determination that the compensable injury extends to the MRI findings of the lumbar spine taken on September 25, 2013 (a small midline annulus tear at L4-5), and we render a new decision that the compensable injury does not extend to the MRI findings of the lumbar spine taken on September 25, 2013 (a small midline annulus tear at L4-5).

DISABILITY

The hearing officer determined that the claimant had disability from November 13, 2014, continuing through the date of the CCH. We have affirmed that portion of the hearing officer's determination that the compensable injury extends to the MRI findings of the lumbar spine taken on September 16, 2014 (L4 laminectomy defect consistent with mild epidural fibrosis associated mild focal retraction of the thecal sac and nerve roots, a small pseudomeningocele at L4, mild degenerative changes at L5-S1 associated shallow right foraminal focal disc protrusion without significant nerve root impingement). There was sufficient evidence to establish that the claimant was unable

to obtain and retain his pre-injury wage for that period due to that affirmed portion of the extent-of-injury determination. Accordingly, the hearing officer's determination that the claimant had disability from November 13, 2014, continuing through the date of the CCH is affirmed.

MMI/IR

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (Division) shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary.

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

The hearing officer determined that the claimant reached MMI on June 10, 2015, with a 10% IR as certified by (Dr. H), the designated doctor. The hearing officer stated the following in her Discussion:

> Because the extent-of-injury issue was resolved in favor of the [c]laimant, a Presiding Officer's Directive (POD) was issued to the designated doctor [Dr. H] so that the entire compensable injury could be rated.

Dr. H examined the claimant on September 24, 2015, and in a Report of Medical Evaluation (DWC-69) dated September 29, 2015, certified that the claimant reached MMI on June 10, 2015, with a 10% IR. Using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides), Dr. H placed the claimant in Diagnosis-Related Estimate Lumbosacral Category III: Radiculopathy, based on his being informed that "through the [CCH] the lumbar spine has been accepted as part of the compensable event." Dr. H's MMI/IR certification was assessed in response to the POD requesting that he rate

the entire compensable injury as determined by the hearing officer. However, given that we have reversed that portion of the hearing officer's determination and rendered a new decision that the compensable injury does not extend to the MRI findings of the lumbar spine taken on September 25, 2013 (a small midline annulus tear at L4-5), D. H has considered and rated a condition that has been determined not to be part of the compensable injury. Accordingly, we reverse the hearing officer's determinations that the claimant reached MMI on June 10, 2015, with a 10% IR.

There are other MMI/IR certifications in evidence. Dr. H initially examined the claimant on August 28, 2014, and certified that the claimant had not reached MMI based on a hernia, bowel obstruction, and a herniated nucleus pulposus. The condition of a herniated nucleus pulposus was neither before the hearing officer nor actually litigated by the parties at the CCH. Accordingly, Dr. H's August 28, 2014, MMI/IR certification cannot be adopted.

On October 16, 2014, the Division sent Dr. H a letter of clarification notifying him that he had been appointed to also determine the extent of the claimant's compensable injury, and requested Dr. H to opine on the extent of the compensable injury and also to clarify if this opinion would impact his MMI/IR, disability, and ability to return to work opinions. Dr. H responded on November 11, 2014, and provided a DWC-69 considering only the accepted hernia and bowel obstruction that certified the claimant reached MMI on September 16, 2013, with a 0% IR. However, given that we have affirmed that portion of the hearing officer's determination that the compensable injury extends to the MRI findings of the lumbar spine taken on September 16, 2014 (L4 laminectomy defect consistent with mild epidural fibrosis associated mild focal retraction of the thecal sac and nerve roots, a small pseudomeningocele at L4, mild degenerative changes at L5-S1 associated shallow right foraminal focal disc protrusion without significant nerve root impingement), Dr. H's November 11, 2014, DWC-69 does not consider and rate the entire compensable injury and cannot be adopted.

Dr. H also included an alternate DWC-69 dated November 11, 2014, certifying that the claimant had not reached MMI based on the accepted hernia and bowel obstruction as well as the "lumbar condition." However, Dr. H failed to specify the lumbar conditions for which he assessed impairment. Because some "lumbar conditions" have been determined to not be part of the compensable injury, Dr. H's alternate DWC-69 cannot be adopted.

As there is no MMI/IR certification in evidence that can be adopted, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

SUMMARY

We reform Finding of Fact No. 1.D. as follows, to conform to the actual stipulation made by the parties at the CCH:

> On (date if injury), the claimant sustained a compensable injury at least in the form of an umbilical hernia with a bowel obstruction.

We affirm that portion of the hearing officer's determination that the compensable injury extends to the MRI findings of the lumbar spine taken on September 16, 2014 (L4 laminectomy defect consistent with mild epidural fibrosis associated mild focal retraction of the thecal sac and nerve roots, a small pseudomeningocele at L4, mild degenerative changes at L5-S1 associated shallow right foraminal focal disc protrusion without significant nerve root impingement).

We affirm the hearing officer's determination that the claimant had disability from November 13, 2014, continuing through the date of the CCH.

We reverse that portion of the hearing officer's determination that the compensable injury extends to the MRI findings of the lumbar spine taken on September 25, 2013 (a small midline annulus tear at L4-5), and we render a new decision that the compensable injury does not extend to the MRI findings of the lumbar spine taken on September 25, 2013 (a small midline annulus tear at L4-5).

We reverse the hearing officer's determinations that the claimant reached MMI on June 10, 2015, with a 10% IR, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. H is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. H is still qualified and available to be the designated doctor. If Dr. H is no longer qualified or available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI and IR for the (date if injury), compensable injury.

The hearing officer is to advise the designated doctor that the compensable injury extends to an umbilical hernia with a bowel obstruction as stipulated by the parties, as well as the MRI findings of the lumbar spine taken on September 16, 2014 (L4 laminectomy defect consistent with mild epidural fibrosis associated mild focal retraction of the thecal sac and nerve roots, a small pseudomeningocele at L4, mild degenerative changes at L5-S1 associated shallow right foraminal focal disc protrusion without significant nerve root impingement). The hearing officer is also to notify the

designated doctor that the compensable injury does not extend to the MRI findings of the lumbar spine taken on September 25, 2013 (a small midline annulus tear at L4-5).

The certification of MMI can be no later than the statutory date of MMI, which the parties have stipulated is June 10, 2015. The certification of MMI should be the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated considering the physical examination and the claimant's medical records.

The assignment of an IR is required to be based on the claimant's condition as of the MMI date considering the medical records and the certifying examination and according to the rating criteria of the AMA Guides and the provisions of Rule 130.1(c)(3). After a new certification of MMI/IR is submitted, the parties are to be provided with the designated doctor's DWC-69 and narrative report. The parties are to be allowed an opportunity to respond. The hearing officer is to determine the issues of MMI and IR consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **HARTFORD CASUALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TX 75201-3136

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge